Hofstra University *and* Office and Professional Employees International Union, Local 153, AFL–CIO. Case 29–CA–19409

September 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 4, 1997, Administrative Law Judge D. Barry Morris issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate the Act by refusing to furnish information the Union requested. We disagree.

The Union represents the Respondent's clerical and technical employees, and was party to a collective-bargaining agreement effective from September 1, 1992, to August 31, 1995. In March 1995[1] the Respondent hired the Pappas Consulting Group to undertake an evaluation of the clerical staff. The consultant distributed questionnaires to employees, reviewed the completed questionnaires, and made some proposals in a draft report submitted to the Respondent's president in May.

The Union made numerous requests for the draft report to prepare for negotiations for a successor collective-bargaining agreement, including requests in mid-June before negotiations commenced, on June 27 at the first bargaining session, and on August 1 at the second session. The Respondent replied that it was not obligated to furnish the information to the Union.

The judge credited testimony that no final report was prepared because the Respondent terminated the project, the Respondent did not adopt any proposal in the draft report, and the Respondent did not use the draft report to formulate any position taken in collective bargaining. The judge concluded that the draft report was not relevant to the Union's bargaining duties because the project for which it was compiled was terminated and the Respondent did not use the report to prepare for bargaining.[2]

It is well settled that an employer has an obligation to furnish a union, on request, information necessary to enable the union to peform its duties as collective-bargaining representative of unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). This obligation is a continuing one, extending beyond contract negotiations and ''applies to labor-management relations during the term of an agreement.'' Id. at 436. Information pertaining to the wages, hours, and working conditions of unit employees is ''so intrinsic to the core of the employer-employee relationship that such information is considered presumptively relevant.'' *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). Where the information is presumptively relevant, the employer has the burden of proving lack of relevance. *Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969), cert. denied 396 U.S. 928 (1969).

In explaining the purpose of the consultant's study to the university community, the Respondent's president stated:

> We want to understand better how we can make the most effective use of available technology and what can reasonably be anticipated for the future. We need to know how to maximize our resources when we need them. We want to better understand the flow of work as we shift from peak periods such as the fall and spring semesters to the somewhat lower pressure parts of the academic year.

The questionnaire used by the consultant to prepare the draft report contained questions designed to determine, ''What you do, How and When you do it.'' The Respondent's director of human resources explained to the Union that the purpose of the questionnaire was to ''find out what the responsibilities of the individuals are . . . and, also, what the job content was.'' The consultant analyzed the answers in the returned questionnaires and made proposals in the draft report submitted to the University. Given the above, we find that the draft report relates to job responsibilities and content, and therefore encompasses mandatory subjects of bargaining and thus is presumptively relevant. *Washington Hospital Center*, 270 NLRB 396, 400–401 (1984). That the Respondent made no use of the draft report is irrelevant since the information contained in the report is presumptively relevant to the Union in fulfilling its obligations as statutory bargaining representative.[3]

[1] All dates hereafter refer to 1995, unless otherwise indicated.

[2] Although the Respondent initially contended that the report was confidential, the judge rejected that defense, and, as noted above, the Respondent did not file any exceptions to the judge's decision. Accordingly, we adopt the judge's finding that the Respondent has not met its burden of proving that the information sought is confidential.

[3] Our dissenting colleague assumes arguendo that the draft report was presumptively relevant, but concludes that the Respondent rebutted the presumption by showing that that the project was abandoned and that no bargaining proposals were based on the draft report. We disagree. In our view, the fact that the Respondent did not use the draft report establishes only that the Respondent decided the report was not relevant to its purposes. Under Sec. 8(a)(5) of the Act, however, ''the key inquiry is whether the information sought by the

Continued

Further, the Respondent's hiring of the consultant occurred shortly before bargaining for a successor agreement began between the Respondent and the Union. The Union made clear to the Respondent that it was requesting the information to prepare for bargaining. In testimony elaborating on its need for the information, the Union explained that it feared the University was displacing a certain unit employee classification with nonbargaining unit employees and that it was concerned about the possibility of subcontracting unit work—both concerns related to mandatory bargaining subjects. The president's statement about the purpose of the consultant's study and the information sought in the questionnaire the consultant used strongly suggest that the draft report might relate in some way to these bargaining subjects.[4] Thus, rather than simply requesting information about which it was curious, the above shows that the Union's request was bottomed on specific concerns about mandatory bargaining subjects.[5]

In concluding that the draft report was not relevant because the Respondent did not use the report to prepare for bargaining, the judge appears to have treated the draft report as information pertaining to matters outside the bargaining unit. When a union seeks information pertaining to matters outside the bargaining unit, the union must make a showing that the requested information is relevant to bargainable issues. *San Diego Newspaper Guild*, supra at 867. In other words, the principle of presumptive relevance does not apply. In such cases, the Board has focussed on whether the employer relied on the information sought in deciding whether the requested information was relevant to the union. See, e. g., *General Electric Co.*, 192 NLRB 68 (1971), enfd. 466 F.2d 1177 (6th Cir. 1972).

It is true, as the Respondent argues, that in *Washington Hospital Center*, supra—a case involving presumptively relevant information—the employer used the information the union sought. We do not agree, however, that *Washington Hospital Center* or any other case the Respondent cites holds that information pertaining to bargaining unit matters must be relied on by the possessor for bargaining or other purposes for the information to be presumptively relevant. Such a rule would put in one party's hands the ability to decide unilaterally whether information pertaining to wages, hours, and working conditions was relevant. The Respondent may not have utilized any of the information contained in the draft report and may have decided it was not relevant to bargaining, but because the requested information was presumptively relevant, the Union was entitled to examine the information and determine for itself whether it was relevant to bargaining.

We find that the Respondent, by refusing to furnish the draft report to the Union, violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing to furnish information that is relevant and necessary to the Union's role as the exclusive bargaining representative of unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent has refused to furnish information that is relevant and necessary to the Union's role as the exclusive bargaining representative of unit employees, we shall order the Respondent to furnish the information the Union requested in a timely fashion.

ORDER

The National Labor Relations Board orders that the Respondent, Hofstra University, Hempstead, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Office and Professional Employees International Union, Local 153, AFL–CIO as the exclusive bargaining representative of the employees in the appropriate unit by refusing to furnish information that is relevant and necessary to the Union's role as the exclusive bargaining representative of unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Union is relevant to *its* duties.'' *NLRB v. Leonard B. Herbert, Jr. & Co.*, 696 F.2d 1120, 1124 (5th Cir. 1983) (emphasis added). Because employers and unions often have divergent interests, information that is not considered relevant by one party may be highly relevant to the other. Furthermore, the Supreme Court has adopted a discovery-type standard of what constitutes relevant information. *Acme Industrial*, supra, 385 U.S. at 437. Under that liberal standard, where, as here, the information requested pertains to employees' working conditions, ''the information must be disclosed unless it plainly appears irrelevant.'' *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir. 1977). In sum, the Respondent's failure to take some action based on the draft report is not conclusive and does not ''plainly'' establish that the report would be of no use to the Union in carrying out its statutory duties and responsibilities.

[4] The president, in explaining why the consultant was interviewing the staff, emphasized effective use of technology, maximizing resources, and understanding the distribution of work between peak and low periods of the year. The questionnaire sought information about how automation would change a job, the annual work cycles of a job, and a breakdown of time spent on individual job tasks.

[5] The dissent faults the Union for failing to show that the draft report was relevant to a proposal it wished to make in bargaining. However, because the draft report contained information pertaining to unit employees' working conditions, ''it is not required that the union show the precise relevancy of the requested information to particular current bargaining issues.'' *Teleprompter Corp.*, supra, 570 F.2d at 8. Further, we fail to see how the Union's request could be more specific when it did not know what the draft report contained beyond the obvious fact that it dealt with unit employees' working conditions.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the draft report prepared by the Pappas Consulting Group.

(b) Within 14 days after service by the Region, post at its Hempstead, New York facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HIGGINS, dissenting.

I agree with the administrative law judge that Respondent did not violate Section 8(a)(5) of the Act by refusing to supply the consultant's draft report concerning the clerical operation. The judge concluded, and I agree, that the draft report was not relevant to the Union's bargaining duties. Even assuming arguendo that the draft report was presumptively relevant, Respondent rebutted that presumption when it established, without contradiction, that the project was abandoned prior to negotiations, and that no bargaining proposals were based thereon.

My colleagues suggest that the draft report may nonetheless have been relevant to upcoming contract negotiations. Although it is conceivable that the draft report may have been relevant to a proposal that the Union itself might wish to make, there is no showing to this effect. Indeed, the Union did not even make this contention until the hearing in this case, i.e., long after Union's request for the information and the Respondent's response thereto.

I agree with my colleagues that the issue is whether the information is relevant to the Union's duties as representative. However, the information would be relevant to the Union's duties only if it pertained to a present or potential proposal of Respondent or to a present or potential proposal of the Union. As discussed above, Respondent's proposal was withdrawn, and the Union did not timely assert that the information was relevant to a present or potential proposal of its own.

Further, I agree with my colleagues that the information deals with working conditions. However, this fact would simply make the information presumptively relevant, a legal proposition that I have conceded arguendo. Finally, the cases cited by my colleagues are inapposite. In *NLRB v. Leonard B. Herbert, Jr. & Co.*, 696 F.2d 1120 (5th Cir. 1983), the union requested information concerning the relationship between signatory employers and other companies. The court found that the requested information was relevant because the union could use it to determine whether ''to pursue legal means by which it could hold the nonunion companies to the terms of the collective bargaining agreement involved here.'' In finding the information relevant, the court found that the union's information request on its face was sufficient to put the employers on notice of the basis of the union's suspicions that the employers were violating the contract. Here, there is no such showing nor is there such a contention.

Likewise, in *Teleprompter Corp. v. NLRB*, 570 F.2d 48 (1st Cir. 1977), the court adopted the Board's finding that information concerning the financial condition of subsidiaries of the parent company was relevant where the parent had pleaded inability to pay higher wages during collective-bargaining negotiations and the subsidiaries were the actual employers of the unit employees. Again, unlike in this case, the union advanced its specific reasons for seeking the information at the time the request was made. As the court observed, ''the subsidiary's financial data became relevant here solely because of its relationship, in a bargaining context, to the parent's claim of financial inability.''

For all of the above reasons, I agree with the judge that Respondent did not violate Section 8(a)(5) by failing to supply the information.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Office and Professional Employees International Union, Local 153, AFL–CIO as the exclusive bargaining representative of

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

the employees in the appropriate unit by refusing to furnish information that is relevant and necessary to the Union's role as the exclusive bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner the draft report prepared by the Pappas Consulting Group.

HOFSTRA UNIVERSITY

Diane H. Lee, Esq., for the General Counsel.
John D. Giansello, Esq. (Orrick, Herrington & Sutcliffe), of New York, New York, for the Respondent.
Anne L. Brown, Esq. (Lilly & Bienstock), of Garden City, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on May 8, 1996. On a charge filed on August 8, 1995,[1] a complaint was issued on October 31, alleging that Hofstra University (Respondent or the University) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by refusing to furnish certain requested information. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York not-for-profit corporation, with its principal office and place of business in Hempstead, New York, has been engaged in the operation of an educational institution. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find, that Office and Professional Employees International Union, Local 153, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Since 1976 the Union has been the exclusive collective-bargaining representative of Respondent's office, clerical, and technical employees. The parties have entered into successive collective-bargaining agreements, the most recent of which was effective by its terms for the period from September 1, 1992, to August 31, 1995. By memorandum of agreement dated October 19, 1995, the parties entered into a successor collective-bargaining agreement, effective from September 1, 1995, to August 31, 1998.

Janet A. Lenaghan, Respondent's director of human resources, appeared to me to be a credible witness. She testified that in March 1995 the University hired an outside consultant firm, the Pappas Consulting Group, to undertake an evaluation of the clerical staff. The Pappas Group administered a questionnaire which they asked each of the unit employees to complete. Lenaghan credibly testified that the Pappas Group reviewed the completed questionnaires and made some proposals in a draft report. She further credibly testified that the draft report was submitted in May to the president and one or two vice presidents and then was ''abandoned and terminated.'' Based on Lenaghan's credible and uncontroverted testimony, I find that no final report was ever prepared, that the proposals or recommendations in the draft were not adopted by the University, that nothing in the draft was implemented, and that the draft report was not used by Respondent to formulate any position taken by the University in the collective-bargaining negotiations.

John Dunn, the Union's business representative, testified that in March he discussed the questionnaires with Lenaghan and was told by her that the questionnaires were ''to assist the University in determining the job responsibilities'' of the bargaining unit employees. Pursuant to Dunn's request, on April 4 Lenaghan furnished him with a copy of the questionnaire. Dunn credibly testified that on April 28, during a meeting with James McCue, a vice president of the University, he told McCue that he would like a copy of the Pappas Report when it was ''completed.'' On May 12 Dunn wrote a letter to Lenaghan in which he stated ''the Union requests copies of the completed Position Analysis Questionnaire filled out by the bargaining unit employees represented by Local 153.'' On June 15 Dunn again asked McCue for the Pappas Report. McCue replied that based on his discussions with counsel for the University, the Union was not entitled to the report. At a meeting held on August 1 Dunn made clear to counsel for Respondent that he was requesting the Pappas Report, and not the completed questionnaires. Respondent's counsel advised him that it was Respondent's position that the Union was not entitled to the report since ''it was an internal document and was not adopted by the University.'' On August 3 counsel for Respondent wrote to Dunn as follows:

> With respect to your request to review a copy of the Pappas Report, it is initially noted that the report is confidential and has not been adopted by the University. Therefore, we do not believe that the report is at all relevant to these negotiations or to your duties as a collective-bargaining agent for certain employees at the University.

B. *Discussion and Conclusions*

1. Confidentiality

Respondent contends that the survey results contained in the Pappas Report are confidential. Lenaghan testified that she told the employees that the completed questionnaires would be kept confidential. However, nowhere on the ques-

[1] All dates refer to 1995 unless otherwise specified.

tionnaire does it state that the answers would be confidential. In addition, Lenaghan was not able to affirmatively state that her assistant who handed out some of the questionnaires told the employees that their answers would be kept confidential. In *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995), the Board stated:

> Confidential information is limited to a few general categories: that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.

The information in question does not fall into the above general categories of confidential information. Respondent has merely asserted that the information sought was confidential. I believe that Respondent has not met its burden of proving that the information is confidential.

2. Relevancy

There is no dispute that the Pappas Consulting Group is an outside independent consultant. Respondent maintains that since the report was never finalized but instead only a draft was submitted to the University's president and one or two vice presidents; since the project was ''abandoned'' and ''terminated''; and since nothing in the draft was implemented, the report was not relevant to the Union's collective-bargaining duties and, therefore, Respondent was not required to furnish the draft report. The General Counsel has cited no case involving job evaluation data to support its position that in the circumstances of this case Respondent was required to furnish the report. Respondent, on the other hand, has cited several cases dealing with job evaluation data, including *Washington Hospital Center*, 270 NLRB 396 (1984). While in that case the Board held that the hospital was required to furnish certain requested information, Respondent in this proceeding argues that the case is distinguishable.

In *Washington Hospital Center*, the hospital commissioned Hayes/Hill, Inc. to undertake a study in order to establish a comprehensive job classification and compensation plan. In conjunction therewith, the hospital employees were provided Hayes/Hill questionnaires designed to gather information about their jobs. The administrative law judge found that the Hayes/Hill study was ''virtually completed'' around March 1981. The judge also found that Hayes/Hill material, at least in part, was utilized by the personnel department in arriving at recommendations for the upgrading and increases in pay for unit clerks (270 NLRB at 399). In January 1982 the hospital notified the union president that it ''intends to implement as of March 7, 1982, a comprehensive program developed by Hayes/Hill.'' Similarly, in February 1982 the hospital's director of personnel advised the Union's business agent that ''Hayes/Hill would probably go into effect in the near future.''

I find that the facts in the Washington Hospital Center case are clearly distinguishable from the facts in the instant proceeding. In this proceeding there was never a final report, instead a draft report by an outside independent firm was submitted to the University's president and one or two vice presidents. The project was promptly abandoned and terminated. I have credited Lenaghan's uncontroverted testimony that nothing in the draft was implemented. On the other hand, in *Washington Hospital Center*, supra, the Hayes/Hill study was ''virtually completed'' around March 1981, the hospital advised the Union president that it ''intends to implement'' a comprehensive program developed by Hayes/Hill; and the judge found that the Hayes/Hill material was at least in part utilized by the personnel department in arriving at recommendations for the upgrading in increases in pay for unit clerks. Accordingly, I find that the draft Pappas Report is not relevant to the Union's bargaining duties and Respondent did not violate the Act in failing to furnish the report.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times the Union has been the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All office, clerical and technical employees, including secretaries and assistants employed by the University, excluding all other employees, professional employees, confidential employees, supervisors and guards as defined in the Act.

4. Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order omitted from publication.]